RECORD AND BRIEF

No. 16-341

IN THE

Supreme Court of the United States

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OFFICE OF THE

TC HEARTLAND LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP,

Petitioner,

v.

KRAFT FOOD GROUPS BRAND LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMERICAN BANKERS ASSOCIATION, THE CLEARING HOUSE PAYMENTS COMPANY L.L.C., FINANCIAL SERVICES ROUNDTABLE AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. The ABA, whose members hold a substantial majority of domestic assets of the banking industry of the United States and are leaders in all forms of consumer financial services, often appears as amicus curiae in litigation that affects the banking industry.

The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Payments Company L.L.C. owns and operates core payments system infrastructure in the United States. The Payments Company is the only private-sector automated clearing house ("ACH") and wire operator in the United States, clearing and settling nearly $2 trillion in U.S. dollar payments

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[1] Pursuant to Rule 37.6, counsel represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the *amici*, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel represents that counsel of record received timely notice of the intent to file this brief and all parties have consented to the filing of this brief. Petitioner has filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs; written consent of Respondent is being submitted contemporaneously with this brief.

each day, representing half of all commercial ACH and wire volume.

Financial Services Roundtable ("FSR") is the leading advocacy organization for America's financial services industry. With a 100-year tradition of service and accomplishment, FSR is a dynamic, forward-looking association advocating for the top financial services companies, keeping them informed on the vital policy and regulatory matters that impact their business. FSR members include the leading banking, insurance, asset management, finance and credit card companies in America.

Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services-banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

Congress enacted a restrictive patent venue statute in response to abusive practices under the existing permissive venue regime. That was more than a century ago. This Court repeatedly has enforced that restriction and rejected efforts to relax venue in patent suits against domestic companies. In particular, it repeatedly has interpreted a domestic corporation's residence—for venue purposes in a patent suit—to be only its state of incorporation. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353

U.S. 222, 226 (1957); *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 707 n.2 (1972). But now this Court needs to repeat itself once again because the appeals court mistakenly has ruled that this Court's consistent position does not govern.

Amici Curiae have a strong economic interest in the resurrection of this restrictive interpretation. Their members and owners have faced numerous patent infringement suits in districts (i) where most *amici* members and owners are not incorporated and (ii) that are not the location of the underlying alleged infringing acts. More than 5% of companies targeted in suits by patent assertion entities are banks. *See* Stephen Joyce, *New Technologies Make Banks a Magnet for Patent Trolls*, Bloomberg BNA, Sept. 16, 2015, http://www.bna.com/new-technologies-banks-n17179936102/. Often, these suits lack merit but the cost of settling may be less than the cost of litigating until a ruling on the merits is issued. This burdens the defendant and can also allow patents to stand that should be invalidated. Applying the special venue statute's restriction on residence would be a step toward ending this serious problem in our nation's patent system.

BACKGROUND

A. MORE THAN 40% OF PATENT LAWSUITS ARE FILED IN A SINGLE DISTRICT

Today, more than 40% of patent lawsuits are filed in a single district. That district is not a technology hub or financial industry center and is not in Delaware where an outsized number of corporations incorporate. It is the Eastern District of

Texas, where in 2015 42% of all patent actions were filed: "This district alone accounts for 42% of all patent filings in 2015, and patent cases are 49% of the district's civil caseload that year." MARGARET S. WILLIAMS ET AL., FEDERAL JUDICIAL CENTER, PATENT PILOT PROGRAM: FIVE-YEAR REPORT 17-18 (April 2016), http://www.fjc.gov/public/pdf.nsf/lookup/Patent-Pilot-Program-Five-Year-Report-2016.pdf/$file/Patent-Pilot-Program-Five-Year-Report-2016.pdf ("FJC Report"). This concentration of patent suits in a single district is so pronounced that it has been mocked on HBO. *See Last Week Tonight with John Oliver: Patents* (April 19, 2015), http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/02/34-april-19-2015/video/ep-34-clip-patents.html; *see also This American Life: When Patents Attack!* (July 22, 2011), http://www.thisamericanlife.org/radio-archives/episode/441/when-patents-attack; Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. Times, Sept. 24, 2006, http://www.nytimes.com/2006/09/24/business/24ward.html.

B. PLAINTIFFS' PREFERRED FORUM IS 4.65 TIMES LESS LIKELY TO STAY AN ACTION PENDING PATENT OFFICE REVIEW

Five years ago, Congress recognized that many issued patents are invalid in whole or in part so it passed The Leahy-Smith America Invents Act, 35 U.S.C. §100 *et seq.*, to combat that and other problems. This Act established expedited trial

procedures in the Patent Office to review the patentability of issued patents. The history of these Patent Office trials confirms Congress's premise. As of July 31, 2016, the Patent Office had completed 1,086 "inter partes review" trials since the Act, and in 928 of these trials it had held unpatentable some or all of the patent claims at issue. *See* U.S. PATENT AND TRADEMARK OFFICE, PATENT TRIAL AND APPEAL BOARD STATISTICS (July 31, 2016), at 10, http://www.uspto.gov/sites/default/files/documents/2016-07-31%20PTAB.pdf. It also had completed 134 "covered business method" patent trials, and in 131 of these it had held unpatentable some or all patent claims at issue. *Id.* at 11.

Naturally, most petitions for Patent Office review of issued patents are made in response to being sued in court for infringement of the patent. Unless the court stays the infringement suit, two patent review proceedings proceed in parallel, raising costs for the parties. While Congress did not require trial courts to stay patent infringement actions pending such Patent Office trial review, such stays are commonly granted—except in the District patent plaintiffs choose 42% of the time.

In patent suits filed by non-practicing entities, plaintiffs' preferred District reportedly is 4.65 times less likely to stay the action pending Patent Office review than the national average. Douglas B. Wentzel, *Stays Pending Inter Partes Review: Not In The Eastern District Of Texas*, 98 J. Pat. & Trademark Off. Soc'y 120, 137 (2016) (In cases filed by non-practicing entities, "[a]s of August 31, 2015, the grant rate for stays pending IPR in the Eastern District was just 15.6%–4.65 times less than the

nationwide average of 72.5% . . . ."). The Federal Judicial Center has reported a similar imbalance: "The Eastern District of Texas, for example, represents 50% of the cases in the database, but only 20% of all stays for PTO or ITC review. The Northern District of California, on the other hand, represents 6% of the patent cases in the database, but 23% of the stays for PTO or ITC review. These differences merit further investigation." FJC Report at 17-18.

C. PLAINTIFFS' PREFERRED FORUM IS ABOUT 7 TIMES LESS LIKELY TO REACH JUDGMENT

The most obvious purpose of patent litigation is to enforce valid patents against infringement. Another important purpose is to invalidate improperly issued patents. That, of course, requires that the action reach judgment. Patent actions filed in patent plaintiffs' preferred District are less likely to reach judgment. "In the Eastern District of Texas a mere 1% of cases are terminated by judgment, whereas overall, cases resulting in judgment represent 7% of all terminations." FJC Report at 33 (addressing cases in "patent pilot" districts).

SUMMARY OF ARGUMENT

The question of statutory interpretation here is whether the applicable venue statutes, properly interpreted, specially restrict venue when suing a domestic corporation for patent infringement. They do. As the Petition explains, the special venue statute for patent cases, 28 U.S.C. § 1400(b), restricts a domestic corporation's residence to its state of incorporation and that restriction is not overridden

by the current general venue statute, *id.* § 1391. *Amici* agree with the statutory-interpretation analysis of Petitioner but submit this brief to address an additional tool of statutory interpretation supporting the same conclusion. Specifically, the Court's consistent interpretation of the special, restrictive patent venue statute also is compelled by core purposes of our patent laws that are defeated by easy forum shopping.

ARGUMENT

I. CORE PURPOSES OF PATENT LAW SUPPORT THE COURT'S INTERPRETATION OF THE PATENT VENUE STATUTE

The Court's consistent interpretation of the patent venue statute is compelled by core purposes of the Patent Act. When interpreting a statute it is appropriate to consider the purpose of the statute and statutory framework.

In interpreting a bankruptcy statute regarding which expenses a debtor may exclude from his income when determining his ability to pay a debt, this Court considered the purpose of the law. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61 (2011). *Ransom* interpreted a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) allowing a debtor, in calculating his "reasonably necessary" expenses, to claim only "applicable" expense amounts listed in certain IRS published standards. The issue was whether a debtor, who owns a car but does not make loan or lease payments on it, may claim the published standard deduction for vehicle-ownership costs. After

primary statutory interpretation tools pointed to a narrow view of "applicable," limiting the debtor to expenses actually relevant to his situation, the Court turned to the overall statute's purpose: "consideration of BAPCPA's purpose strengthens our reading of the term 'applicable.'" *Id.* at 71. The purpose of the statutory means test was to ensure that debtors repay creditors the maximum amount the debtors can afford. "This purpose is best achieved by interpreting the means test, consistent with the statutory text, to reflect a debtor's ability to afford repayment." *Id.*

In *Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006), the petitioner tripped and fell over mail left on her porch by a Postal Service employee. The statutory interpretation issue was whether the following exception in the broad waiver of immunity in the Federal Tort Claims Act applied: "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." *Id.* at 491. In interpreting this exception narrowly, to be inapplicable to the petitioner's slip and fall action, the Court considered the "'central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'" *Id.* at 492. "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Id.* at 486.

Here, the contrary interpretation of the patent venue statute by the appeals court indisputably has led to easy forum shopping and a massive imbalance in the distribution of patent suits in the United

States. This in turn undermines two core purposes underlying our patent laws: (1) favoring strict post-issuance scrutiny of government-granted patent monopolies, and (2) favoring efficient patent licensing and follow-on innovations.

A. EASY FORUM SHOPPING UNDERMINES STRICT SCRUTINY OF GOVERNMENT-GRANTED MONOPOLIES

The Court long has viewed post-issuance scrutiny of patent monopolies as essential to our patent system. The "important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain," led the Court to permit patent licensees to challenge validity because otherwise, "[i]f they are muzzled, the public may continually be required to pay tribute to would-be monopolists without need or justification." *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969). Post-issuance scrutiny of patents is necessary not only to cancel invalid patents but also to restrict the scope and use of valid patents: "[o]nce the patent issues, it is strictly construed, it cannot be used to secure any monopoly beyond that contained in the patent, the patentee's control over the product when it leaves his hands is sharply limited, and the patent monopoly may not be used in disregard of the antitrust laws." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964) (citations omitted). For example, a patent owner "should not be . . . allowed to exact royalties for the use of an idea . . . that is beyond the scope of the patent monopoly granted." *Blonder-Tongue Labs., Inc.* v. *Univ. of Ill. Found.*, 402 U.S. 313, 349–350 (1971).

An efficient and fair patent litigation system promotes all of these public policies of our patent system. The Patent Act allows those accused of infringement to defend on the ground that the patent is invalid or unenforceable. It allows trial judges to construe patent claims, often more narrowly than the scope the patent owner had asserted in its enforcement efforts. Patent litigation identifies and cancels invalid patents, defeats overly broad assertions of patent scope, and penalizes misuse of patent monopolies—all serving the public interest. Conversely, easy forum shopping defeats each of these purposes.

Easy forum shopping often allows patent owners to choose the forum least likely in the nation to allow a speedy or low-cost determination of invalidity or non-infringement. For example, patent owners with questionable patents and/or unreasonable infringement assertions naturally will flock to the district least likely to stay a patent suit pending Patent Office review proceedings, least likely to grant an early motion to dismiss for patent invalidity, least likely to allow an early summary judgment motion of non-infringement or invalidity, and least likely to enter judgment of patent invalidity.

In sum, the heavy concentration of patent suits in a single preferred forum of patent plaintiffs does not merely disadvantage individual defendants. It undermines the public policy favoring strict scrutiny of issued patents.

Simple economics demonstrates that easy forum shopping especially shields the weakest patents from the necessary scrutiny. Patent owners

with questionable patents or infringement allegations often seek and extract settlements under the cost of defense. *See, e.g.*, Ranganath Sudarshan, *Nuisance-Value Patent Suits: An Economic Model and Proposal*, 25 Santa Clara Computer & High Tech. L.J. 159 (2009). This values the patent asset not on its legitimacy or contribution to the art but rather on avoiding the cost of proving that the asset is invalid or inapplicable. When the value of the asset is therefore directly derived from the amount of defense costs that will be incurred prior to a ruling on the merits, such patent owners rationally choose the forum that imposes the greatest costs to obtain a merits ruling. Consequently, patents that should promptly be invalidated or declared inapplicable to modern technology instead, by virtue of cost-of-defense settlements, survive to tax or cloud what ought to be in the public domain.

Today, perhaps the single greatest factor in the cost of defending a patent suit is the district court's willingness to stay the suit pending Patent Office review. A patent-infringement suit defendant can easily spend ten times more money defending itself in court than it spends in a Patent Office trial. Patent plaintiffs naturally are more likely to file suit in a district that is 4.65 times less likely to stay the expensive patent infringement action pending the inexpensive Patent Office trial.

This harm forum shopping causes to a core purpose of our patent system supports the statutory interpretation urged by Petitioner and *amici*, which interpretation restricts such forum shopping.

B. EASY FORUM SHOPPING UNDERMINES PATENT LICENSING AND INNOVATION

Easy forum shopping also encourages a sue-first regime that promotes litigation over negotiation. This, of course, would be unwelcome in any area of law, but it is particularly antithetical to our patent system. Our patent system's promotion of innovation depends not only on motivating first innovators by issuing them patents but also on motivating subsequent innovators to invent around those issued patents. These dual engines of innovation fostered by our patent system depend on a well-functioning system of patent notices and licensing.

More specifically, issuing patents on true inventions can promote innovation partly by encouraging others to either further invent to avoid those patents (perhaps further advancing the arts) or to instead take a license to use the patented technology (rewarding the first innovator and spreading the benefits of the invention). Multiple Patent Act provisions further this purpose. Section 287 encourages patent owners to give actual notice of patents and infringement allegations. Section 154(d) encourages patent applicants to also give potential infringers actual notice of published patent applications. Further, § 112 mandates particular and distinct patent claims, in part to provide clear notice to follow-on innovators who want to innovate around a patent without risking suit.

Properly construed, the special patent venue statute's restriction on forum shopping also furthers this core purpose of the patent system. Without this

statute, properly interpreted, patent owners often are free to choose virtually any forum of their liking, and become loath to provide pre-suit notice of infringement for fear that they might forfeit the forum of their choice, should the alleged infringer respond with a declaratory judgment action in a different forum. But the calculus is different under the restrictive venue dictate of § 1400(b) limiting patent suits to districts where the defendant domestic corporation is incorporated or has an established place of business and has allegedly infringed. That venue restriction reduces the strategic forum-shopping disincentive to do what the patent system encourages—provide notice of the patent and alleged infringement and attempt to resolve the matter without litigation.

In sum, interpreting the patent venue statute to allow easy forum shopping defeats core purposes of our patent system.

C. THE SPECIAL PATENT VENUE STATUTE DOES NOT UNDULY BURDEN PATENT OWNERS

Some urging maintenance of today's easy forum shopping regime argue that applying *Fourco* would unduly restrict patent holders' ability to enforce their patents. But *Fourco* does not unduly burden patent owners. First, the special patent venue statute does not restrict venue in suits against foreign defendants. *See Brunette*, 406 U.S. at 707. Second, it extends venue not only to the domestic corporation's state of incorporation but also all places "where the defendant has committed acts of infringement and has a regular and established place

of business." 28 U.S.C. § 1400(b). This "place of business" avenue has been interpreted liberally, to mean doing business "through a permanent and continuous presence" in the district, but not necessary a fixed physical presence. *See In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985). Often this affords the patent owner multiple venue choices, especially in actions against large corporations with regular and established places of business throughout the country.

D. NOTING THE HARM CAUSED BY EASY FORUM SHOPPING IS NOT AN ATTACK ON ANY PARTICULAR FORUM

None of the points made by Petitioner or *amici* imply, depend on, or assume wrongdoing by any trial court. It is a strength of our federal judiciary that trial courts enjoy latitude in varying procedures and policies within certain constraints. The point, instead, is that given the opportunity patent owners naturally flock to a district at the extreme end of these natural variations, which inevitably will exist in a system with more than 90 district courts. What is a strength generally harms central purposes of our patent system. This is one reason why the Court again should recognize and enforce Congress's judgment that patent suits be governed by their own special, restrictive venue provision.

CONCLUSION

Amici respectfully request the Court grant *certiorari* to again rule that the patent venue statute restricts a domestic corporation's residence to its

state of incorporation, which restriction advances core purposes of our patent system.

Respectfully submitted.

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